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No. 97-706

IN THE

Supreme Court of the United States

October Term, 1997

CENTURY OFFSHORE MANAGEMENT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Sixth Circuit

REPLY OF PETITIONER

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1. In its response, the United States concurs in Petitioner's request for this Court to review the issue of whether the Department of the Interior ("DOI") is precluded from claiming royalties on non-recoupable settlement payments made by oil and gas purchasers on the ground that such royalty claims exceed DOI's statutory authority under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.* U.S. Br. at 11. In a brief footnote, however, the United States takes the position that this Court should not review whether the United States Court of Appeals for the Sixth Circuit, in reversing a bankruptcy court's grant of summary judgment, exceeded its appellate authority by improperly applying a *de novo* standard of review to the bankruptcy court's findings of fact rather than the clearly erroneous standard of review. *Id.* at 11 n.4.

2. But the Government's position is incorrect. According to the Government, the Sixth Circuit's decision was not based on *de novo* findings of fact but "on the court's evaluation and construction of the parties' overall contractual relationship -- a legal issue properly subject to *de novo* review." *Id.* However, the interpretation of an "overall contractual relationship" -- i.e., where matters outside of the four walls of the particular contract at issue are considered -- is not a pure question of law but is instead a question of fact. *See Sanitary Farm Dairies, Inc. v. Gammel*, 195 F.2d 106, 117 (8th Cir. 1952) ("Ascertainment of what the terms of a contract actually are, where they are ambiguous and where the extrinsic evidence to illuminate is not of unequivocal effect, is functionally a matter of fact-determination"); *Blue Cross & Blue Shield Ass'n v. United States*, 17 Cl. Ct. 558, 564 (1989) (when interpretation of contract provision rests on parol evidence issue becomes question of fact rather than law).[1] As Professor Corbin has explained:

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[1] As explained below, the Sixth Circuit's ultimate interpretation of the parties "overall contractual relationship" was not simply a function of the textual interpretation of a contract or contracts, and in any event, where

> Not infrequently, both the existence and the terms of a contract must be determined by inferences to be drawn from letters, conduct, and oral statements of the parties. If from the whole material thus adduced more than one inference may reasonably be drawn, the determination of the inferences to be drawn -- the interpretation -- is for the jury or other trier of the facts. (footnote omitted).

3 Arthur L. Corbin, *Corbin on Contracts* § 554, at 226-27 (1960).[2] Thus, the Government's assertion that the Sixth Circuit acted properly in performing a *de novo* review of the "overall contractual relationship" between Petitioner and the purchaser of its natural gas is incorrect.

3. Nor can there be any doubt that the Sixth Circuit made a *de novo* review of the facts surrounding the "overall contractual relationship" between the parties. The record before the Sixth Circuit was the same that was before the bankruptcy court. On the basis of the extrinsic evidence in that record, which it found to be undisputed, the bankruptcy court found that Enron had offered to extinguish its non-recoupable take-or-pay obligations under the Fixed-Price Contracts and had engaged in negotiations with Petitioner in which the parties ultimately agreed that the present value of

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the terms of one contract are interpreted by consideration of another, that is parol evidence as to the first contract.

[2] Corbin posits that simple textual interpretation of *unambiguous* contracts is also a question of fact, even though such interpretation is provided by the court:

> The question of interpretation of language and conduct -- the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law.... There is no "legal" meaning, separate and distinct from some person's meaning in fact.

3 Arthur L. Corbin, *Corbin on Contracts* § 554, at 218 (1960).

Enron's remaining payments under the Fixed-Price Contracts was $12.25 million in the event Enron never purchased any additional gas under those contracts. On the basis of that same undisputed extrinsic evidence and an admission by the Government at oral argument, the bankruptcy court also found that the parties did not negotiate for a reduced price for gas to be purchased in the future under the Spot-Price Contracts and that, as a result, no part of the $12.25 million settlement payment was an advance payment for gas to be purchased under the spot contracts. However, after conducting its own review of the record, including presumably the extrinsic evidence that was adduced by each party, the Sixth Circuit concluded, contrarily to the evidence submitted by Petitioner, that no part of $12.25 million settlement payment was intended by the parties to extinguish Enron's admitted obligation to make take-or-pay payments during the remaining years of the Fixed-Price Contracts. Rather, the Sixth Circuit determined that the entire lump sum settlement payment acted as a prepayment for gas that Enron bought under the Spot-Price Contracts, even though Enron had no right or obligation under those contracts to purchase a minimum quantity of gas from Petitioner. Thus, there can be no doubt that the Sixth Circuit improperly substituted its own view of the "overall contractual relationship" between the parties in place of the findings of fact that were made by the bankruptcy court and affirmed on appeal to the district court. The standard of review question raised by Petitioner therefore merits review by this Court just as much as the underlying issue of whether the Government is entitled under OCSLA to royalties on non-recoupable payments made to settle non-recoupable take-or-pay liabilities.

4. The procedural posture of this case constitutes an additional reason for granting review of Petitioner's second issue. The Sixth Circuit has not only reversed the bankruptcy court's grant of summary motion to Petitioner but granted the Government's motion for summary judgment. However, the Government's motion was filed only three days prior to the bankruptcy court's hearing on Petitioner's motion. When

Petitioner's motion was granted, the Government's motion became moot. As a result, Petitioner has never been given an opportunity to file an opposition to the Government's unverified motion, to rebut the extrinsic evidence that the Government submitted in support of its motion, or to have a hearing on that motion. Consequently, the improper fact finding by the Sixth Circuit also has deprived Petitioner of the most basic right to due process of law.

Respectfully submitted,

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